

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

ORIGINAL
WITH PROOF
OF SERVICE

77-4001

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

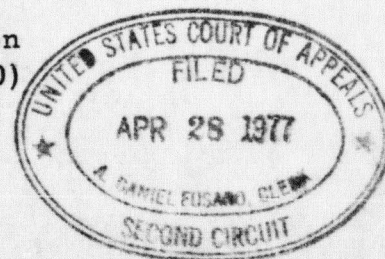
SCIENTIFIC PEST CONTROL CORPORATION;
LOCAL 522, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA,

Respondents.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF RESPONDENT SCIENTIFIC
PEST CONTROL CORPORATION

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SCIENTIFIC PEST CONTROL CORPORATION; LOCAL
522, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF
AMERICA,

Respondents.

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BRIEF OF RESPONDENT SCIENTIFIC
PEST CONTROL CORPORATION

ISSUE PRESENTED

1. Whether there is substantial evidence in the record to sustain the Board's Order requiring the reinstatement of William Raupp and Dennis Balz to the Respondents' St. James facility?

2. Whether there is substantial evidence in the record to sustain the Board's Order requiring the payment of back pay to William Raupp and Dennis Balz until reinstatement at the St. James facility?

PRELIMINARY STATEMENT

The Board in its Decision and Order found that respondent

company had committed a number of violations of the Act. While not conceding as such that these violations did, in fact, take place, we recognize that there is substantial evidence in the record to support most of these findings so they are, accordingly, not challenged by respondent company in this proceeding.

Respondent company, however, does contend that there is not substantial evidence in the record to sustain the Board's Order to the company that it reinstate its former employees, William Raupp and Dennis Balz to its St. James facility and to pay them back pay until such reinstatement is accomplished. This portion of the Order is, we submit, unwarranted and should not be enforced by the Board.

STATEMENT

Paragraph 27(a) of the Complaint issued by the Board in this case (A. 400) alleges that on October 18, 1974, respondent discharged Raupp and Balz. The following paragraph, 27(b), states that they were reinstated to their employment on October 28 and 29, 1974. In Paragraph 29(a), it is alleged that these same two employees were discriminatorily transferred from respondent's St. James shop to its Port Washington facility.

The facts surrounding these events are stated by the Administrative Law Judge who heard the case in his Decision (A. 362, l. 16-47). The Administrative Law Judge found that Raupp and Balz were dismissed

on October 18, 1974 because they refused to join respondent union. They were then both recalled to work on October 28 and 29, as set forth in paragraph 27(b) of the complaint, supra. This recall was not to their previous place of employment in St. James but to another facility in Port Washington, some distance away. As stated in the Judge's decision, respondent recalled them to Port Washington instead of St. James in order to avoid a likely confrontation between these two Local 155 employees and the rival Local 522 adherents at St. James.

Raupp and Balz were thereafter, in December 1974, again terminated when they refused to obtain a license required by the local county for their work (A. 75-78). These dismissals in December were not alleged in the complaint to be in violation of the Act and the Administrative Law Judge so found (A. 362, l. 37-40). The Judge also found that the prior reinstatement of Raupp and Balz to Port Washington on October 28 and 29 constituted full and complete reinstatement within the meaning of the Act so as to toll back pay at that point (A. 362, l. 44-45).

This finding was based upon the admission by the General Counsel for the Board at the hearing, in response to questions from the Judge, that these reinstatements were full and that no back pay is to be awarded after such time (A. 331, l. 19 - A. 332, l. 15). This colloquy was as follows:

"JUDGE DWYER: Let me ask you one question.

"On the reinstatement of Balz and Raupp, is it the General Counsel's position that those reinstatements were full under the Act, so that if, since we have no question, at least in this Complaint, of the later discharge, that's out, am I being asked by the General Counsel for back pay for those interim periods, and that's about it?

"MR. EISENBERG [General Counsel]: That's correct, for those individuals.

Not with respect to Mr. Clifford.

"JUDGE DWYER: That's the only question I had.

"MR. EISENBERG: Okay.

"JUDGE DWYER: You're not claiming that the reinstatement that was done at that time, was other than full reinstatement?

"MR. EISENBERG: With respect to Mr. Raupp we are claiming that at the time his salary was reduced and thereafter stayed the same, we would want back pay for that entire period until the time he left employment for the last time, I believe it was December 7th."

Despite these admissions by Board General Counsel and concomitant findings by the Administrative Law Judge, the Board in its Decision and Order directed respondent Company to nevertheless offer Raupp and Balz reinstatement at St. James and pay them wages back to their dismissals in December 1974 (A. 378-380). The Board further found, again contrary to what it is claimed in the Complaint or found by the Administrative Law Judge, that the December legal dismissals of Raupp and Balz in December 1974 for failure to obtain licenses, did not negative the imposed requirement of reinstatement and back pay (A. 380).

ARGUMENT

THERE IS NOT SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THAT PORTION OF THE BOARD'S ORDER DIRECTING THE REINSTATEMENT OF RAUPP AND BALZ TO RESPONDENT'S ST. JAMES FACILITY WITH BACK PAY.

It is axiomatic and self-evident that a respondent, in this or any other action, does not have to defend itself against claim not enumerated in the complaint which sets the parameters of the action.

Here, as set forth above, the complaint and the admissions by Board's General Counsel make clear that the reinstatement of Raupp and Balz at Port Washington on October 28 and 29 were considered by the Government as full and complete reinstatement and respondent Company was, accordingly, entitled to rely upon this fact. Yet the Board saw fit to rule otherwise and hold such reinstatement inoperative.

Furthermore, the Board opines, without a shred of support in the record, that the discharge of the two employees in December for failure to obtain required licenses might not have happened had they remained at St. James (A. 380). It is impossible to determine the basis for this finding but the Board made it nevertheless.

The plain fact, however, is that these men were discharged in December for refusal to obtain governmentally required licenses. These licenses were required in St. James just as they were in Port Washington since they were county-wide in scope. The distinction made by the Board is, therefore, without logic. These men were terminated

for valid legal reasons not challenged by the Board. These terminations, accordingly, irrespective of where they occurred, should properly end any responsibility by respondent company for reinstatement and, particularly, for back pay.

For these reasons, we respectfully urge the Court to deny enforcement of that portion of the Board's Order requiring reinstatement and back pay for Raupp and Balz.

Dated: April, 1977.

Respectfully submitted,

KIMMELL AND KIMMELL
Attorneys for Respondent Company
150 Broad Hollow Road
Melville, New York 11746

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

JULIO VALLEJO, JR., being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 703 REMSEN AVE.
BROOKLYN, NYC.

That on the 27th day of APRIL, 1977,
deponent personally served the within BRIEF OF RESPONDENT SCIENTIFIC
PEST CONTROL CORPORATION
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

~~By leaving _____ true copies of same with a duly
authorized person at their designated office.~~

By depositing 3 true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

NATIONAL LABOR RELATIONS BOARD
Petitioner
Washington, D. C.

Sworn to before me this

27th day of APRIL, 1977.

Michael DeSantis
MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979

Julio Vallejo, Jr.